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No. 97-0359

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In The

Supreme Court of the United States

October Term, 1996

C. K. GREENWOOD,

Petitioner,

-and-

NATIONAL UNION FIRE INSURANCE CO. OF PITTSBURGH, PENNSYLVANIA,

Intervenor-Petitioner,

vs.

SOCIETE FRANCAISE DE TRANSPORTES MARITIME and INDIAN OCEAN BULK CARRIERS, LTD.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Court of Appeals act correctly in determining that the evidence presented by the Petitioner in this case was insufficient to support a jury verdict in his favor?

STATEMENT PURSUANT TO RULE 29.6

Neither Societe Francaise de Transportes Maritime, nor Indian Ocean Bulk Carriers, Ltd., have any parent companies or any nonwholly owned subsidiaries.

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STATEMENT OF THE CASE

Petitioner asks this Court to review the decision of the Court of Appeals holding that "there was insufficient evidence to sustain the jury verdict." He does so on the grounds that there was a defect in the winch which was hidden and not known or open and obvious to the stevedore's longshoremen. The stevedore was an independent contractor employed by the vessel to discharge its cargo.

Longshoreman Greenwood was injured when he was struck by a cargo hook being used to discharge a cargo of pipe from the vessel into a truck on the dock. The stevedore's cargo hooks were attached to a hook on the ship's crane which moved the pipe from the vessel's hold onto the truck. After landing a load of pipe on the truck one of the tag lines (ropes) attached to the cargo hooks used to guide the pipe onto the truck got hung up on the truck or the ship's rail as the longshoreman crane operator Logue was swinging the crane back over the ship. Longshoreman Logue testified that when he tried to stop the crane's horizontal movement the slewing brake malfunctioned and the crane continued to move horizontally "for a little ways" until the tag line broke causing the cargo hook to swing striking Greenwood. (R. Vol. 6, pp. 95, 98).[1] The same type of malfunction was involved in *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981), except the movement was vertical rather than horizontal.

Petitioner alleges he presented two different theories of recovery under the Longshore and Harbor Workers' Compensation Act:

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1. Record citations are to the volume and page of the Appellate Court record.

> 1. either the Shipowners knew of the defect that caused his injuries but kept it hidden from the Stevedore. . . .
>
> or
>
> 2. . . . both the Stevedore and the Shipowners knew about the defect and the Shipowners knew further that the Stevedore would act improvidently and work on in the face of the defect.

(Pet. for Cert., p. 3).[2]

In fact, not only did the Petitioner fail to present any evidence that the Shipowner knew the Stevedore was acting improvidently in continuing to use the crane (111 F.3d at 1249, Pet. for Cert., App. A at 22), but also there was no evidence presented that the alleged defect was hidden from the stevedore.

Petitioner attempts to create an impression that there was evidence of a hidden defect by alleging that:

> . . .To a man, *they* (six longshoremen) *testified* that they knew of no problem with the crane at the time of the accident and therefore, *that the defect was hidden.*

(Parenthesized words added). (Pet. for Cert., p. 9).

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2. Petitioner did not specifically plead either of these theories in his First Amended Complaint (R. Vol. 3, p. 308), but they were included in the Contested Propositions of Law in the Joint Pretrial Order. (R. Vol. 2, pp. 222-231). However, Petitioner's counsel did not try the case on either the "hidden defect" or "obviously improvident" theories. He did not argue at any time that the defect was "hidden" by the shipowner from the stevedore or that the stevedore's conduct was so obviously improvident that the shipowner had a duty to intervene. Nevertheless, the Court of Appeals gave Petitioner the benefit of the doubt, and after full consideration concluded the evidence was insufficient to sustain a verdict on either theory.

But none of these six longshoremen testified that the defect was "hidden." Not only is the word "hidden" absent from any of the quotations from the testimony of the six longshoremen contained in Exhibit H to the Petition (pp. H3-H4), as well as from all the other testimony in the case, but also the Petitioner's counsel repeatedly sought to emphasize his point that the crane operator was "the person in the best position to know exactly what happened the day of this accident." (*See infra*, n.11). Logue was the only longshoreman who testified that there was anything wrong with the crane's slewing brake. The Court of Appeals noted that if the evidence of the other six longshoremen "were credited . . . the shipowners would be entitled to judgment." (111 F.3d at 1247, Pet. for Cert. App. A at 16).

Longshoreman Logue testified that the crane's slewing brake was not functioning properly the first time he used it, continued malfunctioning for his full one hour on duty and was still doing so when he returned to duty operating the winch one hour later. The accident occurred shortly after he returned to duty. The malfunctioning was clearly known to and open and obvious to him, one of the stevedore's most important longshoreman in such operations. (R. Vol. 6, p. 99).

Longshoreman Logue was Petitioner's first and primary witness without whom Petitioner had no evidence that the slewing brake on the crane winch was malfunctioning or that there was any type of a "hazard" to the longshoremen at all. Longshoreman Logue's testimony was clear and unequivocal that the "hazard" was open and obvious and fully known to him for over two hours prior to the accident. Longshoreman Logue testified that he continued to operate the crane winch both before and after the accident because it was not malfunctioning bad enough to stop using it:

> Q: Excuse me. If it's too bad, then you're going to shut the crane down. Is that right?

> A: If my estimation that it is too bad. I'm going to — I'm going to tell my — I'm going to stop the crane and I'm going to go tell my gang foreman that that crane is too bad, it's going to get somebody hurt, you get you another man, I am not going to operate that crane, in the shape it's in. . . .
>
> Q: Did you do that on this job?
>
> A: No, I did not.

(R. Vol. 6, p. 124).

Like this case, *Scindia* involved an allegedly malfunctioning winch in use by longshoremen during cargo operations. This Court made it clear that the primary responsibility for the safety of longshoremen rests upon the stevedore:

> On the facts posited here, for two days prior to the accident, it had been apparent to those working with the winch that this equipment was malfunctioning. *Even so, whether it could be safely used or whether it posed an unreasonable risk of harm to Santos or other longshoremen was a matter of judgment committed to the stevedore in the first instance.*

(Emphasis added). *Scindia*, 451 U.S. 154 at 175.

Logue was an experienced and expert crane operator who had worked as a longshoreman for 32 years and operated cranes for 25 or 26 years. (R. Vol. 6, p. 75). He obviously concluded the crane could be safely used and did not pose an unreasonable risk of harm to the longshoremen.

Crane operator Logue concluded it could be safely used,

noting that he would have told his gang foreman that it was "too bad" and would have refused to use it if the condition of the crane were not satisfactory in his estimation. (R. Vol. 6, p. 124). He believed it was still safe to use after the accident because he continued to operate the crane without requesting that any repairs be made to it. If the longshoremen believed the crane posed an unreasonable risk of harm either before or after the accident, they had a duty to inform the ship's crew, in order to permit repairs to be made. The longshoremen did not even report the accident to the ship's crew, and continued to use this crane for three days after the accident without requesting that any repairs be made to it.[3]

This Court held in *Scindia* and *Howlett* that because the stevedore is often the party best able to prevent injuries, and because Congress intended to recognize this fact by enacting the 1972 Amendments to the Longshore and Harbor Workers' Compensation Act (33 U.S.C. §§ 901-950) (hereinafter "LHWCA"), the stevedore is the party which normally should compensate Petitioner for his injuries, not the shipowner. *Scindia*, 451 U.S. 156 (1981); *Howlett*, 512 U.S. 92 (1994).

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3. Petitioner's contention that the "hazard was not obvious to or anticipated by the stevedore" as the Magistrate Judge interpreted the jury's answer to an interrogatory is directly contrary to what the jury found:

> 3. Do you find from a preponderance of the evidence that the hazard was one which was likely to be encountered by the Plaintiff's employer, the stevedore, as set out in the court's instructions?
>
> Answer: "Yes" or "No"
>
> Answer: *yes.*

(R. Vol. 1, p. 127). The interrogatory did not even address the obviousness of it as Longshoreman Logue described it.

The 1972 Amendments to the LHWCA included very substantial increases in weekly compensation benefits to offset the limitation on a longshoreman's third party right to recover against shipowners. Petitioner has been paid weekly compensation from the date of the accident and will continue to receive it for the rest of his life with annual adjustments based on increases in the national average weekly wage unless he is able to return to work. Prior to the 1972 Amendments, the maximum weekly compensation rate was $70 per week. At the time of Petitioner's injury on April 1, 1986, the maximum rate was $595.24. Based on two-thirds of his average weekly wage for the year prior to his injury, Petitioner's rate was $492.45. Because of annual adjustments, his present weekly compensation rate is estimated to be $635.58. He has been paid a total of $339,600 in weekly benefits, or an average of approximately of $566.94 per week, or $29,530.43 per year for the last 11.5 years. None of this income is subject to social security or income tax. By December 1991, shortly before trial, Mr. Greenwood had been paid a total of $142,888.95, or an average of $25,662.57 per year for 5.5 years. Since that time he has been paid additional weekly benefits to approximately September 30, 1997, in the amount of $196,714.05, or an average of $635.58 per week. This equates to an average of $33,061.18 per year for 6 years.[4] Prior to the 1972 Amendments his total weekly benefits would have been $41,975 at $70.00 per week of $3,650 per year for the 11.5 years. His medical bills have been paid in the total amount of $71,438 and will continue to be paid for life. The same amount for medical expenses would have been payable prior to the 1972 Amendments.

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4. The 1972 Amendments provided that the weekly compensation rate for total permanent disability would be increased on October 1 of each year based on the percentage increase in the national average weekly wage not to exceed 5%. (33 U.S.C. § 910(f)). As Respondents have not been furnished the dates on which these increases in weekly benefits started, we are not able to be more precise as to the increases each year, but they have ranged from 1.69% to 3.83%.

REASONS FOR DENYING THE WRIT

I.

NONE OF PETITIONER'S CONTENTIONS ESTABLISH ANY OF THE CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI SET OUT IN SUPREME COURT RULE 10.

The Questions Presented, as set forth by the Petitioner, allege that he was somehow prevented from *pleading* in the alternative in the trial court. The Petitioner's first question assumes that the doctrine of judicial estoppel applied to prevent him from pleading in the alternative. In fact, the Petitioner's general pleading entitled him to try the case on alternative theories. The real problem was not an inability to plead in the alternative, but rather an inability to submit sufficient evidence to support a verdict in his favor under the principles of law first set out by this Court in *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981), and later strengthened and reaffirmed in *Howlett v. Birkdale Shipping Co., S.A.*, 512 U.S. 92 (1994). The doctrine of judicial estoppel applied only as collateral support for the Court of Appeals' broader holding that the evidence submitted by the Petitioner was insufficient to support a verdict in his favor.

The Petitioner's second question again assumes that the doctrine of judicial estoppel was applied in some unexplained way to bar alternative *pleading* in the trial court under FED. R. CIV. P. 8(a) and, therefore, that the Court of Appeals violated the re-examination clause of the Seventh Amendment. With his general pleading, the Petitioner was accorded his full right to try his case in the alternative. Nothing the Court of Appeals did affected his pleadings or the trial itself. The Seventh Amendment provides that "no fact found by a jury shall be otherwise re-

examined in any Court of the United States, than according to the rules of the common law." One of these common law rules requires the Court of Appeals to perform one of its most basic functions — to determine whether the evidence is sufficient to support a jury verdict. The doctrine of judicial estoppel referenced in a footnote is only one of the rules of the common law which played a small part (not a controlling one) in this process in this case.

Thus set forth, the Petitioner's real Question Presented becomes clear:

> **Was the Court of Appeals correct, after making an exhaustive and thoughtful analysis of the evidence and the law as articulated by this Court, in determining that the evidence was insufficient to sustain a jury verdict in favor of the Petitioner?**

This question does not establish any of the considerations governing review on Writ of Certiorari set out in Supreme Court Rule 10:

1. There are no conflicting decisions of other United States Courts of Appeal or any conflicting decisions of state courts of last resort.

2. The decision of the Court of Appeals is not in conflict with, but directly follows the settled federal law as set out by this Court in *Scindia* and *Howlett*.

3. The Petition asserts an alleged error in the application of a properly stated rule of law (judicial estoppel) which was cited only in a footnote and as a collateral, not a controlling, rule supporting the Court of Appeals' holding that there was insufficient evidence to support

the jury verdict. This is not one of those rare cases in which the Petition should be granted.

II.

THE *GASPERINI* CASE IS NOT RELEVANT TO THE SUFFICIENCY OF THE EVIDENCE ISSUE IN THIS CASE.

This Court's decision in *Gasperini v. Center for Humanities, Inc.*, 116 S. Ct. 2211 (1996), does not address any issue in this case. The only issue before the Court of Appeals in this case was whether the evidence was sufficient to sustain the jury verdict. This required the careful and thoughtful consideration of all of the evidence, which the Court of Appeals recognized.[5]

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5. The Court of Appeals applied the following standards:

> In reviewing the sufficiency of the evidence, we "consider all of the evidence — not just that evidence which supports the nonmovant's case — but in the light and with all reasonable inferences most favorable to the party opposed to the motion." *Maxey v. Freightliner Corp.*, 665 F.2d 1367, 1371 (5th Cir. 1982) (en banc). The jury's verdict must be upheld unless "the facts and inferences point so strongly and overwhelmingly in favor of" the movant for directed verdict "that the Court believes that reasonable men could not arrive" at a verdict against the movant. *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969) (en banc). "A mere scintilla of evidence is insufficient to present a question for the jury." *Id.* However, "If there is substantial evidence . . . of such quality and weight that reasonable and fairminded persons in the exercise of impartial judgment might reach different conclusions" then a directed verdict is not proper. *Maxey*, 665 F.2d at 1371.

111 F.3d at 1245-46, Pet. for Cert., App. A at 13.

Petitioner contends that footnote 12 is the only basis on which the Court of Appeals decided the issue. In footnote 12, the doctrine of judicial estoppel is cited as collateral support for its conclusion that the evidence was insufficient to support the jury verdict. This was not a controlling factor.

The doctrine of judicial estoppel was not involved in *Gasperini*. The sufficiency of the evidence to support a jury verdict was not involved. What was involved in *Gasperini* was whether the federal or state standard of review was to be applied in determining whether a jury's award of damages was excessive, that is, contrary to the weight of the evidence. The dissenting opinion's disagreement with the Court's opinion was based on its view that the Seventh Amendment re-examination clause prohibits federal appellate courts from reviewing refusals by District Courts to set aside civil jury awards as contrary to the weight of the evidence. In *Gasperini*, the sufficiency of the evidence to sustain a verdict *in some amount* was not questioned by the parties, by the majority opinion, or by the dissenting opinions.

Weighing the evidence to determine whether a damage award is excessive is vastly different from reviewing the evidence to determine if there is sufficient evidence to support any verdict at all.

Gasperini simply does not have any application to the sufficiency of the evidence issue in this case.

In any event, this Court concluded that appellate review of the weight of the evidence did not violate the Seventh Amendment. For even stronger reasons, it follows that appellate review of the sufficiency of the evidence does not violate it either.

III.

THE COURT OF APPEALS CORRECTLY APPLIED THE LAW SET OUT IN THIS COURT'S DECISIONS IN *SCINDIA* AND *HOWLETT.*

Petitioner's disagreement with the decision of the Court of Appeals is confined to the first of two duties of the shipowner during cargo operations which were first articulated by this Court in *Scindia.*[6] The first duty has come to be referred to as the "turnover duty" which *Scindia* held has two parts:

> This duty extends at least (1) to exercising ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property, and (2) to warning the stevedore of any hazards on the ship or with respect to its equipment that are known to the vessel or should be known to it in the exercise of reasonable care, that would likely be encountered by the stevedore in the course of his cargo operations and that are not known by the stevedore and would not be obvious to or anticipated by him if reasonably competent in the performance of his work.

(Parenthetical numbers added.) *Scindia*, 451 U.S. 156 at 166-167.

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6. Petitioner does not challenge the Court of Appeals holding that there was insufficient evidence to support a verdict on this second separate duty of the shipowner on which Petitioner allegedly relied — that if both the stevedore and the shipowner have actual knowledge of a hazard which is such that the stevedore in continuing the cargo operations is so obviously improvident, the shipowner has a duty to intervene and stop the work. Petitioner never contended the stevedore did anything wrong.

The shipowner met the first part of this duty as it inspected all of the winches on all of the cargo cranes prior to the commencement of cargo operations and found them to be in proper working order. (R. Vol. 8, p. 147). Petitioner's principal witness confirmed that the crane winch was reasonably safe to use or he would have refused to use it. He did not contend the defect was hidden. Petitioner relies on the second part of this turnover duty, alleging the shipowner "knew of the defect . . . but kept it hidden from the Stevedore" and failed to warn the longshoreman.[7] (Pet. for Cert. p. 3).

As to the second part of this turnover duty — to warn the stevedore of latent hazards — this Court reaffirmed and made the extent of this part of the duty more clear in *Howlett v. Birkdale Shipping Co., S.A.*, 512 U.S. 92 (1994):

> In sum, the vessel's turnover duty to warn of latent defects in the cargo stow and cargo area (vessel's winch) is a narrow one. *The duty attaches only to latent hazards, defined as hazards that are not known to the stevedore* and that would be neither obvious to nor anticipated by a skilled stevedore in the competent performance of its work.
>
> [. . .]
>
> . . . for even assuming the vessel had knowledge of

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7. At the trial, Petitioner did not argue the defect was "hidden." Instead he focused on trying to establish his alternate theory that both the stevedore and the shipowner had *actual* knowledge of the defect and that the defect was so bad the shipowner had actual knowledge that the stevedore was obviously improvident in continuing to work, and therefore the shipowner had a duty to intervene. Petitioner does not challenge this part of the decision of the Court of Appeals holding the evidence was insufficient to sustain a verdict on this issue.

> the tween deck's (winch's) condition, he (the longshoreman) must further demonstrate that the alleged hazard would have been neither obvious to nor anticipated by a skilled and competent stevedore at the discharge port.

(Parenthetical words and emphasis added.) *Howlett*, 512 U.S. at 105-06.

Please note the longshoreman (not the shipowner) has the burden of proof that the alleged hazard would have been neither obvious to nor anticipated by a skilled stevedore. The uncontradicted evidence in this case demonstrates that the hazard was the alleged malfunctioning of the crane's winch which:

(1) was known to the stevedore through longshoreman Logue who was operating the crane winch prior to, at the time of the accident and after the accident without any repairs being made;

(2) was obvious to stevedore's longshoreman crane operator Logue;

(3) "was one which was likely to be encountered" by the stevedore as the jury found; and

(4) would have been anticipated by a skilled stevedore in the competent performance of its work.

Thus, the shipowner had no duty to warn of a "hazard" about which only the stevedore had any actual knowledge. Whatever "hidden" characteristics the alleged hazard may have had before longshoreman Logue operated the crane winch were immediately eliminated when longshoreman Logue testified he

became fully aware of the defect the first time he operated the crane winch shortly after 7:00 a.m. (R. Vol. 6, p. 95). It was open and obvious to him from that time until the accident occurred when the same functional failure of the slewing brake on the crane winch occurred as had occurred the first time Logue operated the winch for the first time some three hours before the accident. (R. Vol. 6, p. 99). *Scindia* and *Howlett* do not require the defect to be open and obvious to everyone engaged in the cargo operations. It is enough if it is open and obvious to the person best able to prevent injuries. In this case, this person was the crane winch operator Logue who had both the power and the duty to stop using the crane if it was not reasonably safe to so do.[8] Had he stopped the operation to permit the allegedly defective slewing brake to be repaired by the ship's crew, he and his fellow longshoremen would have been fully paid for the dead time involved.[9]

Petitioner's "hidden defect theory" has to rely on longshoreman Logue's testimony to establish a defect. To prove the defect was "hidden," Petitioner has to completely disregard longshoreman Logue's testimony that he was aware of the defect from the first time he operated the crane. In effect, the Petitioner contends Logue knew of the defect, but it was "hidden" from him. An impossibility![10] There is not only insufficient evidence

8. *See* full statement of Logue's knowledge of the defect and his duty, *supra*, pp. 4-6.

9. That the ship's crew would have promptly made the repairs if they had been advised of the defect is confirmed by the fact that approximately an hour after the accident, a defect in the boom brake on the same crane winch was reported to the ship's crew and repairs were promptly made by the ship's crew. This brake was not involved in and did not contribute to the accident, and the longshoremen were paid for the dead time. (R. Vol. 8, p. 79).

10. The dissenting Judge bases his entire attack on the court's (Cont'd)

to support the "hidden defect" theory, the evidence is all to the contrary.

IV.

THE DECISION OF THE COURT OF APPEALS FULLY COMPLIES WITH THE INTENT OF CONGRESS IN ENACTING THE 1972 AMENDMENTS TO THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT, 33 U.S.C. §§ 901-950.

In *Scindia* and *Howlett*, this Court emphasized that the 1972 Amendments to the Longshore and Harbor Workers' Compensation Act made substantial changes in the nature of third party actions by longshoremen against shipowners such as this one. The 1972 Amendments:

(1) abolished the longshoremen's rights to sue the shipowner under the liability without fault doctrine of unseaworthiness and created a new cause of action based on negligence;

(2) abolished the shipowner's right to indemnity from the stevedore for breaching its warranty of workmanlike service; and

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(Cont'd)
opinion on his completely insupportable statement "that there was substantial evidence in the record that a defect did exist and that such defect was unobservable and unknown to the stevedore before that time that" Petitioner was injured. To do so he obviously concluded Logue's knowledge of the defect was unknown to the stevedore before the accident, which is directly contrary to a 1992 decision of the Court of Appeals for the Fifth Circuit, in which the hazard was held to be obvious to the stevedore based on the testimony of two longshoremen crane operators that the hazard was immediately noticeable when they started work. *Pimentel v. Ltd. Canadian Pacific Bul*, 965 F.2d 13, 15 (5th Cir. 1992).

> (3) provided for substantial increases in the compensation benefits longshoremen are entitled to receive from their stevedore employers.

Scindia, 451 U.S. at 165; *Howlett*, 512 U.S. at 97.

In *Howlett*, this Court then elaborated on why Congress made these substantial changes:

> . . . The design of these changes was to shift more of the responsibility for compensating injured longshoremen to the party best able to prevent injuries: the stevedore-employer. *See Scindia Steam*, 451 U.S. at 171. Subjecting vessels to suit for injuries that could be anticipated and prevented by a competent stevedore would threaten to upset the balance Congress was careful to strike in enacting the 1972 Amendments. *Howlett*, 512 U.S. at 92.

This case is a graphic illustration of precisely how this Congressional purpose has been implemented correctly by this Court, the Courts of Appeals and District Courts. Who was the party best able to prevent this accident? The stevedore's longshoreman crane operator Logue![11] He was the only person

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11. At the outset of his closing argument to the jury Petitioner's counsel emphasized this:

> What we know in this case is that, first, the best person — the person in the best position to know exactly what happened the day of this accident is Mr. Kenneth Logue. As you heard everybody on the stand testify, the guy in the crane knows what's going on. He knows how the crane is operating. He knows what happened. And whatever the defendants have tried

(Cont'd)

who had actual knowledge of any hazard and had both the right and the duty to stop using the crane winch if it was not reasonably safe to do so.

All longshoreman Logue had to do was report the condition of the slewing brake to the ship's crew. The crane would have been shut down and the cargo operations stopped until any necessary repairs were made. This is confirmed by the fact that an hour or so after the accident, when the boom brake on the same crane began to malfunction (not the slewing brake involved in the accident), it was shut down immediately for half an hour while the ship's crew repaired it.[12] The longshoremen were paid for this dead time. No repairs to the slewing brake were ever requested by Logue or any other longshoremen.

(Cont'd)

> to say about Mr. Logue, they can't dispute that he is in the best position to know and they can't dispute that he has been doing this for thirty years at the time of this accident, and he knows how to operate a crane. And what we do know is that Mr. Logue was very clear and very straight in his testimony, he didn't waver at all, that this crane did not work right from the start, that it never worked right all the way up to the time of the accident, and that this crane on this ship caused this accident.

Petitioner's counsel emphasized this by obtaining acknowledgements on cross-examination to the same effect from Burt Askey (tagline man) (R. Vol. 8, p. 12), Quincy Guilford (gang foreman) (R. Vol. 8, pp. 51-52), Frank Hinman (walking foreman) (R. Vol. 8, pp. 116-17), Douglas Skoruppa (longshoreman) (R. Vol. 8, pp. 132-33), and Dean Harrison (Defendant's expert) (R. Vol. 8, p. 93).

12. Note well: The boom brake was not involved in Petitioner's accident, it was only the crane's slewing brake which longshoreman Logue claims caused the accident.

As Congress clearly intended under these circumstances, Petitioner has been receiving full weekly compensation benefits from his stevedore employer under the LHWCA and has been furnished all his medical care and attention since the accident, all of which will continue to be paid for his lifetime unless he returns to work. Since his accident on April 1, 1986, he has received weekly benefits of at least two-thirds of his average weekly wage for the year prior to the accident at various rates beginning at $493.45 per week.[13]

By December 1991, shortly before trial, Mr. Greenwood had been paid a total of $142,888.95, or an average of $25,662.57 per year for 5.5 years. Since that time he has been paid additional weekly benefits to approximately September 30, 1997, in the amount of $196,714.05, or an average of $635.58 per week. This equates to an average of $33,061.18 per year for 6 years.[14] Prior to the 1972 Amendments his total weekly benefits would have been $41,975 at $70.00 per week, or $3,650 per year for the 11.5 years. His medical bills have been paid in the total amount of $71,438 and will continue to be paid for life. The same amount for medical expenses would have been payable prior to the 1972 Amendments.

Congress provided at least an adequate rate of compensation

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13. The 1972 Amendments to the Longshore Act fixed the maximum weekly compensation rate at two-thirds of the national average weekly wage (33 U.S.C. § 908). The maximum at the time of the accident was $595.24.

14. The 1972 Amendments provided that the weekly compensation rate for total permanent disability would be increased on October 1 of each year based on the percentage increase in the national average weekly wage not to exceed 5%. (33 U.S.C. § 910(f)). As Respondents have not been furnished the dates on which these increases in weekly benefits started, we are not able to be more precise as to the increases each year, but they have ranged from 1.69% to 3.83%.

from the stevedore for cases such as this where the stevedore was in the best position to prevent injuries to its own employees. Here, the shipowner could do nothing to prevent the injury because the longshoremen did not advise the ship's crew that it was not reasonably safe to use the winch, either before or after the accident.

This Court has fashioned rules of law relating to a shipowner's liability which correctly preserve the delicate "balance Congress was careful to strike in enacting the 1972 Amendments." *Howlett*, 512 U.S. at 92. The Courts of Appeal have faithfully followed these rules as the decision of the Court of Appeals in this case demonstrates. There is no need for this Court to readdress these rules now and the Petition should be denied.

The Questions Presented as articulated by Petitioner are not present in this case.

CONCLUSION

WHEREFORE, Respondents respectfully submit that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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